

The Legacy of Lockdown: Making law and policy post COVID-19

28 July 2020

The global public health and economic crisis caused by COVID-19 led to governments around the world taking unprecedented steps to intervene in their national economies and to restrict the freedoms of their citizens and businesses in ways that would have been unthinkable previously.

Our Public Law and Policy team has looked back at four features of the UK Government's response to the crisis that suggest possible long-term impacts in terms of the way the UK Government will interact with businesses and the economy post COVID-19.

1. Making law and policy post COVID-19: flexibility, ambiguity and a scrutiny gap

The UK Government's approach to regulating public life during the crisis relied heavily on the publication of extensive non-binding government guidance, for example on social distancing and suggested "Covid-secure" business practices, and secondary legislation, enacted under emergency powers, to give certain (but not all) of the measures legal force. The UK Government has made over [100 statutory instruments](#) related to coronavirus since January 2020, which since March 2020 have been made at a rate of seven a week.

This approach afforded the Government much-needed flexibility to implement dramatic shifts in policy quickly at the outset of the crisis. However, it was problematic in three respects.

- First, the use of a mixture of 'soft' and 'hard' instruments by government created uncertainty among businesses and the public as to their legal rights and obligations. Statements of policy by Government Ministers in media interviews – in particular in relation to the terms of the lockdown – were inconsistent with the legal position and/or not clear as to which aspects of the government's statements were required by law and which were simply government advice. This led to uncertainty in what the rules were and inconsistencies in their interpretation by individuals and businesses and their enforcement by authorities.
- Second, this uncertainty was heightened by the government's tweaking of measures – often with little or no notice – to give effect to changes in the government's position as it evolved over time. Such rapid changes in the law further undermine the ability of businesses and the public to know what the law is at any given moment, and of public authorities, such as the police, to understand and enforce it effectively.
- Third, the continued use of emergency powers resulted in a lack of parliamentary scrutiny and public debate over measures before they were introduced. While the use of emergency

measures at the outset of the crisis was arguably justified in the circumstances, this justification is harder to sustain as the country gradually came out of the lockdown. Yet, the UK Government continues to introduce new measures by secondary legislation under emergency powers, such as the Health Protection (Coronavirus, International Travel) (England) Regulations 2020, which came into force on 8 June, less than one week after having been published, and provided for a 14-day quarantine for international arrivals into England. This continues a wider trend of the increased use of secondary legislation (for example, in the context of Brexit) that is likely to survive the extraordinary circumstances brought about by COVID-19. The untrammelled use of such mechanisms amounts to executive law-making, which bypasses parliamentary scrutiny and undermines constitutional principles. Importantly, it also, provides little opportunity for businesses, civil society and the public at large to engage with and be consulted on what are fundamental and unprecedented interventions on public life in the UK.

Each of the above mean that it is particularly key for businesses that operate in the UK to remain engaged with government's ongoing management of the pandemic as well as its policy decisions and law-making beyond the current crisis. Businesses should be prepared to speak up to clarify ambiguities and inconsistencies in new measures and ensure their interests are properly addressed.

2. Making law and policy post COVID-19: A changing machinery of Government

Since Boris Johnson entered Number 10 as Prime Minister in July last year, he has continued to strengthen the centre of Government. One example of this was the change to the reporting lines of political Special Advisers, bringing them all under the line-management of the Prime Minister's Chief Adviser, Dominic Cummings. Another example is the creation of the joint economic and political unit within Downing Street following the reshuffle in February this year. Such changes tend to follow strong electoral mandates; Tony Blair moved to a more presidential-style of government following the 1997 landslide election.

In responding to the public health and economic challenges of Covid-19, the Government has intensified this centralisation. Initially, four Ministerial Implementation Groups (MIGs) were established to lead on healthcare, the general public sector, economic and business, and the UK's international response to the pandemic. They reported into the C-19 Committee of senior cabinet ministers and advisers. Subsequently, the Prime Minister announced in May the creation of five new roadmap taskforces. These committees draw up policy for specific sectors within the UK economy, and cover hospitality, non-essential retail, leisure, churches and other places of worship, and aviation. Crucially, in both of these steps, the policy development moved to the centre.

Civil servants have also been moved into more centralised units, to fill newly-created posts within these new units. The vast majority are on secondment, but as the Government increasingly focuses on the Build Back Better programme, some of these teams are already drawing on opportunities arising from the disruption of COVID-19 to make seismic changes to pre-existing policy priorities. For example, achieving carbon neutrality within the UK by 2050 or sooner, tackling mental health sustainably across the country, strengthening the Union of the UK, levelling up regional economic prosperity and fast-forwarding government action on diversity.

Just as the centre tends to grow strong following a clear electoral win, Departments of State tends to grow stronger as cabinet ministers demand greater policy control for their continued support. An election majority of 80 seats and a national crisis unparalleled since World War II have given No. 10 the mandate and the confidence to centralise control and to keep it for the foreseeable

future. This impacts not only policy development but the way business needs to engage with Government.

3. Making law and policy post COVID-19: Regional fragmentation in the regulation of business

The initial move into the lockdown in late March 2020 was coordinated at the national level by the UK Government. However, the means by which the lockdown was imposed as a matter of law was not uniform. In fact, four legally distinct lockdowns were imposed, one for each of the constituent nations of the UK. In Scotland, Wales and Northern Ireland, each lockdown was imposed through the introduction of regulations by the relevant devolved government. These four separate sets of regulations had similar but not identical provisions and each of them was independently interpreted and administered by the corresponding regional governments.

This fragmentation of approach laid the foundations for potential divergence, which quickly manifested as the initial political consensus about how to respond to the risks posed by the virus began to fray in May 2020, when the Prime Minister sought to set out his roadmap for leaving the lockdown. The introduction of the 14-day quarantine for international travellers and the subsequent relaxation to it was implemented and administered in a similarly coordinated but fragmented way across the four nations.

The potential for divergence of this kind has of course been present since the introduction of the devolution settlements in Scotland, Wales and Northern Ireland, which were put in place over two decades ago and have continued to develop over time (for example, most recently with the Wales Act 2017, which devolved further powers to the National Assembly of Wales and the Welsh Government).

However, divergence in the speed by which each devolved administration has brought its respective nation out of lockdown has arguably given regional governments ample opportunities (often gladly taken) to emphasise their differences from the UK Government. The practical result of which – in particular for those who live, work or operate at, near or across the borders between England, Scotland and Wales – has been that the consequences of crossing these, hitherto largely invisible, lines on the map are now more noticeable. For businesses seeking to continue to operate, to the extent possible, under the restrictions, the regulatory divergence has caused confusion and impeded the ability to adopt a uniform approach across the UK to commercial activity, policies and arrangements with consumers.

There is potential for further divergence. By its nature, coronavirus does not strike equally across the UK: flare-ups and disparities in impact across the nations and regions of the UK have been identified and will persist. As the Prime Minister stated on 23 June 2020 and as shown by the "local lockdown" on Leicester, responses to contain the spread of the virus will now be more targeted and localised. Over time, this could lead to calls for yet more powers being devolved to the regional governments to address this need.

However, if divergence is taken too far, the UK risks creating market conditions that vary by region, under which businesses in Scotland or the North East of England could be made subject to materially different restrictions to those in London or other regions of the UK. This would undoubtedly make doing business in the UK more complicated.

4. Making law and policy post COVID-19: a more muscular industrial and investment strategy?

The various measures introduced by the UK Government, particularly to protect businesses and workers and boost the economy in light of the impact of the lockdown, have resulted in the

biggest intervention in the economy by a British government in modern times. According to the [Office of Budget Responsibility](#), the job retention scheme alone, whereby the government pays up to 80 per cent of workers' wages while they are furloughed by their employers due to coronavirus, is costing the government £14 billion per month.

The Chancellor has announced his intention to bring such measures to an end in October as well as a stimulus package of tax cuts and further spending commitments in his "Mini-Budget", including a £1000 bonus for each furloughed worker retained by employers until then end of January 2021. The Government has also announced that it is developing a plan called "Project Birch" whereby the Government would provide support for (including by purchasing equity stakes in) strategically-important companies whose failure would "disproportionately harm the economy". This would raise difficult questions, such as how to define which companies are sufficiently "strategically-important" and how to navigate state aid rules, which the UK plans to transpose from EU law in adjusted form post 2020.

Such policies may prove short-term and narrow in scope, addressed only at supporting the economy through the worst of the crisis. However, while these measures would not have been contemplated in the absence of COVID-19, they are arguably consistent with wider policy objectives of the current government, such as Boris Johnson's "levelling up" agenda and Theresa May's erstwhile "industrial strategy", not to mention Brexit.

A similar interventionist approach is visible in the regulation of many sectors, particularly in relation to digital markets, with the government recently having introduced a UK Digital Services Tax, proposing new regulation to prevent online harms, and having recently [announced](#) its plan to engage with stakeholders in the digital sector on a range of issues relating to immersive and addictive technology.

The Parliamentary Select Committee for Business, Energy and Industrial Strategy has also recently [announced](#) a super-inquiry on Post-Pandemic Economic Growth, which is intended to examine issues such as *"devolution and the 'levelling-up' agenda, the role Government might play as a shareholder or investor in businesses in the future, and the measures needed to rebuild consumer confidence and stimulate economically and environmentally sustainable growth"*.

Taken together, these policies and politician-led inquiries suggest a trend towards increased governmental intervention in the economy to fulfil policy and/or political objectives. Businesses should be alive to the risks and opportunities such a change in the political weather will present. This includes, in particular, preparing for a regulatory and business environment in the UK in which effective engagement with governments of all political hues (and at multiple levels) is likely to play a bigger role in businesses' strategic planning.

Contacts



Andrew Eaton
Public Law and Policy
Senior Associate, London
T +44 20 7296 5727
andrew.eaton@hoganlovells.com



Telha Arshad
Public Law and Policy
Associate, London
T +44 20 7296 5086
telha.arshad@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2020. All rights reserved.